INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statute and rules involved	2
Statement	4
Argument	6
Conclusion	9
Appendix	10

CITATIONS

Cases:

Blackmon v. *Lee*, 205 F. 2d 13	9
Boylan v. *Quarles*, 235 F. 2d 834	9
Eberlein v. *United States*, 257 U.S. 82	8
Keim v. *United States*, 177 U.S. 290	8
Morse v. *United States*, 270 U.S. 151	7
Powell v. *Brannan*, 196 F. 2d 871	8
United States v. *Seminole Nation*, 299 U.S. 417	6-7
Williams v. *Cravens*, 210 F. 2d 874, certiorari denied, 348 U.S. 819	8

Statutes and Rules:

28 U.S.C. (1952 ed.) 2101(c)	2, 7
Veterans' Preference Act, Section 15, 5 U.S.C. 864	9
Revised Rules of the Supreme Court of the United States, effective July 1, 1954, Rule 34(2)	7
Rules of the United States Court of Claims, revised October 15, 1953:	
Rule 53	6, 7
Rule 53(a)	3
Rule 53(c)	3, 7
Rule 54(a)	3
Rule 54(b)	3, 7

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 919

MORRIS E. ADAMS, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the United States Court of Claims has not yet been reported. It is set forth in the appendix hereto, *infra*, pp. 10-11.

JURISDICTION

The judgment of the Court of Claims was entered on December 5, 1956 (R. 74). Petitioner's motion to alter and amend the judgment, filed on December

27, 1956 (R. 76), was denied January 16, 1957 (R. 76). On January 28, 1957, petitioner filed a motion for relief from the court's order (R. 76), and this motion was denied by the Court of Claims on February 27, 1957 (R. 76). The petition for a writ of certiorari was filed on April 17, 1957. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTIONS PRESENTED

1. Whether the petition for a writ of certiorari in this case, filed ninety-one days after the judgment of the Court of Claims became final, was out of time.

2. Whether the Court of Claims was correct in holding that petitioner's dismissal from Government service as the result of a reduction in force violated none of his rights as a veterans' preference eligible.

STATUTE AND RULES INVOLVED

28 U.S.C. (1952 ed.) 2101 provides in pertinent part:

§ 2101 * * *

* * * *

(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety da after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

* * * *

The pertinent provisions of the Rules of the United States Court of Claims, revised October 15, 1953, are as follows:

Rule 53. REHEARING; AMENDMENT OF JUDGMENTS; NEW TRIALS

(a) Grounds: (1) A rehearing may be granted, a judgment may be altered or amended, or a new trial may be granted when any party questions the correctness or the sufficiency of the Court's conclusions on its findings of fact, or desires to amend the same, or on any ground established by rules of common law or equity applicable as between private parties.

* * * *

(c) Time for Motion: Except as provided in subsection (a) (2) of this rule, a motion for a rehearing or a motion to alter or amend a judgment or a motion to grant a new trial shall be filed not later than 30 days after the entry of the judgment.

* * * *

Rule 54: RELIEF FROM JUDGMENT OR ORDER

(a) Clerical Mistakes: Clerical mistakes in judgments, orders or other parts of the record and errors therein arising from oversight or omission may be corrected by the Court at any time of its own initiative or on the motion of any party and after such notice, if any, as the Court orders.

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc.: On motion and upon such terms as are just, the Court may relieve a party or his legal representative from a final judgment, order, or

proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 53 (c); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of the Court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to set aside a judgment for fraud upon the Court. The relief provided by this rule shall be in addition to the relief available to the United States under Rule 53 (a) (2).

STATEMENT

Petitioner, a veterans' preference eligible, received an indefinite appointment as Clerk, Grade GS-3, on August 4, 1952, at the Veterans Administration Center, Office of the Registrar, Biloxi, Mississippi (R. 23). He was later promoted to Supervisory Clerk, Grade GS-4, and served in this position until

he was separated through reduction in force on December 31, 1954 (R. 23). Petitioner's separation was the result of an administrative determination that, because of a reorganization of the Admission and Discharge Section, in which he was serving, the position of Supervisory Clerk should be abolished as superfluous to the needs of that Section (R. 23). Since petitioner, as occupant of this position, had the least number of points on the retention register in his competitive level, and since there was no available position to which he could be reassigned (R. 23), he was notified by letter of November 22, 1954, of his proposed separation (R. 39).

Petitioner, by letter of November 30, 1954, appealed his dismissal to the Fifth Regional Office of the Civil Service Commission (R. 41). A hearing was set for January 17, 1955, but petitioner by telegram of January 7, 1955, and letter of January 8, 1955, requested cancellation of the hearing (R. 24). Petitioner submitted documentary evidence to the hearing examiner, but in response to an inquiry as to whether he then desired a hearing, petitioner wired the examiner on January 25, 1955, to adjudicate the case on the basis of the documents (R. 44). The Fifth Regional Office on February 2, 1955, decided adversely to petitioner. The examiner's opinion found that petitioner's separation had been effected by reduction in force in accordance with regulations (R. 45), and pointed out that it was the prerogative of the agency to "decide which kinds of jobs are to be abolished in a retrenchment action" (R. 45). On petitioner's further appeal (R. 47), the Civil Service

Commission's Board of Appeals and Review, on April 9, 1955, affirmed the action of the Regional Director (R. 52). The Board also found (R. 52): "You indicate in your appeal that the reduction in force which resulted in your separation was instituted as a means of getting you off the job. However, we find no evidence in the file to substantiate that view."

Petitioner then brought suit in the Court of Claims, alleging procedural error in the manner of his separation, and challenging the right of the agency to abolish his position. Upon cross-motions for summary judgment (R. 15, 18), the court overuled petitioner's motion, granted that of the Government, and dismissed the petition (R. 74). The court's opinion summarized the facts in the case, quoted with approval from the administrative decisions, and concluded (R. 75): "We find nothing to indicate that the action of the Civil Service Commission was arbitrary or otherwise unlawful. In such case its decision is final."

ARGUMENT

1. At the outset, it is plain that the petition for a writ of certiorari was filed out of time. The judgment of the Court of Claims was entered on December 5, 1956 (R. 74). On December 27, 1956, petitioner made a timely motion under Rule 53 of the Rules of the United States Court of Claims to alter and amend the judgment (R. 76). This motion was denied by order of January 16, 1957 (R. 76), and on that date petitioner's time for seeking certiorari began to run. See, *e.g.*, *United States* v. *Seminole*

Nation, 299 U.S. 417, 421, and cases there cited. The petition for a writ of certiorari, which was not filed until April 17, 1957, ninety-one days later, did not comply with the statutory mandate that certiorari for review of a judgment or decree shall be applied for "within ninety days after the entry of such judgment or decree," 28 U.S.C. 2101(c). Nor was timely application made for an extension of this period. See Rule 34(2) of the Revised Rules of the Supreme Court of the United States, effective July 1, 1954.

Petitioner's motion, under Rule 54(b) of the Rules of the United States Court of Claims, for relief from the court's order denying his motion to alter and amend the judgments, filed on January 28, 1957 (R. 76), and denied February 27, 1957 (R. 76), did not affect the time for filing a petition for certiorari. Rule 54(b), *supra*, pp. 3-4, expressly provides that a motion made thereunder "does not affect the finality of a judgment or suspend its operation." [1] Accordingly, the petition for a writ of certiorari is out of

---

[1] While petitioner's motion of January 28, 1957, is captioned "Plaintiff's Motion for Relief from Court's Order," and thus is apparently a Rule 54(b) motion, petitioner would be in no better position if it were construed as a second motion for a rehearing or for a new trial under Rule 53 unless leave therefor was either expressly or implicitly granted. Rule 53(c) requires that a motion under that rule be filed within thirty days of the entry of judgment, and hence while petitioner's first motion under Rule 53 was timely filed within thirty days after December 5, 1956, the date of entry of judgment, a second motion under Rule 53 would have been out of time and would not have postponed petitioner's time within which to seek certiorari. *Morse* v. *United States*, 270 U.S. 151, 154.

time, and should be dismissed or denied for that reason.

2. Assuming that the petition is timely, however, it presents no issue for this Court's review. Petitioner alleges no conflict of decisions (and indeed cites no cases), nor does he raise any question of general importance. His arguments relate solely to alleged procedural irregularities in his removal from his position, contentions which were reviewed and rejected by the Civil Service Commission's regional office and Board of Appeals and Review, and by the Court of Claims. The limited scope of judicial review of such agency action is well established, see, *e.g.*, *Eberlein* v. *United States*, 257 U.S. 82; *Keim* v. *United States*, 177 U.S. 290; *Williams* v. *Cravens*, 210 F. 2d 874 (C.A. D.C.), certiorari denied, 348 U.S. 819; *Powell* v. *Brannan*, 196 F. 2d 871 (C.A. D.C.). Petitioner has shown no basis whatever for further judicial examination of the thrice-reviewed administrative determination.

Petitioner (Pet. 6) has now abandoned one of his principal arguments below—that his dismissal was for cause rather than the result of a reduction in force—but he continues to allege that there were technical deficiencies in the agency notice of separation (Pet. 2, 7); that he was denied permission to review certain Civil Service records (Pet. 3, 7); and that the title of his position was wrongly designated in the agency notice (Pet. 8). These allegations were uniformly rejected below, and even if established, they would not constitute such "substantial departure from applicable procedures" as to warrant

intervention by this Court. See *Boylan* v. *Quarles*, 235 F. 2d 834 (C.A. D.C.); *Blackmon* v. *Lee*, 205 F. 2d 13, 14 (C.A. D.C.). Finally, and apparently for the first time, petitioner contends that the retention register governing his Civil Service status was drawn up in terms of regulations not effective until twenty-three days after December 31, 1954, the effective date of his discharge (Pet. 2).[2] But the record clearly demonstrates that this retention register had been compiled prior to the effective date of petitioner's dismissal, a copy thereof having been sent on December 28, 1954, to the Civil Service Regional Examiner by the Acting Manager of the Veterans Administration Center at Biloxi (R. 33-35).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.

GEORGE COCHRAN DOUB,
Assistant Attorney General.

PAUL A. SWEENEY,
ROBERT S. GREEN,
Attorneys.

MAY 1957.

---

[2] In connection with this argument, petitioner claims also that he was denied reemployment rights under Section 15 of the Veterans' Preference Act. 5 U.S.C. 864. Although he raised this question in his complaint in the Court of Claims, he failed to press it in his motion for summary judgment, and thus would seem to have abandoned it. In any event, he has failed to make even a *prima facie* showing that any of his rights under this statute have been violated.

APPENDIX

IN THE UNITED STATES COURT OF CLAIMS

No. 350-55

(Decided December 5, 1956)

MORRIS E. ADAMS *v.* THE UNITED STATES

Mr. Morris E. Adams, pro se.

Mr. George L. Ware, with whom was *Mr. Assistant Attorney General George Cochran Doub*, for defendant.

ON PLAINTIFF'S AND DEFENDANT'S MOTIONS FOR SUMMARY JUDGMENT

WHITAKER, *Judge*, delivered the opinion of the court:

In 1954 the Veterans Administration Center at Biloxi, Mississippi, concluded that the position of supervisory clerk GS-4 was unnecessary, and they decided to abolish it. Since plaintiff held the position, he was notified on November 22, 1954 that it would be abolished, effective December 31, 1954, and that, since he had the least number of points on the retention register in this competitive level, he would be separated from the service on that date. Plaintiff alleges that this action violated his rights as a veteran's preference eligible.

Plaintiff was notified of his right to appeal to the Regional Office of the Civil Service Commission. He did appeal. A date for a hearing was set, of which plaintiff was notified. Plaintiff did not choose to appear at the hearing, but submitted certain docu-

ments and requested that the case be decided upon the basis of those documents.

The decision was adverse to him. In it the Regional Director properly said that it was the prerogative of the agency to "decide which kinds of jobs are to be abolished in a retrenchment action," and, further, that "based upon the facts presented, we do not find a violation of the Reduction in Force Regulations."

Plaintiff took an appeal to the Civil Service Commission in Washington. The Board of Appeals and Review affirmed the action of the Regional Director. It also found:

> You indicate in your appeal that the reduction in force which resulted in your separation was instituted as a means of getting you off the job. However, we find no evidence in the file to substantiate that view. * * *

We find nothing to indicate that the action of the Civil Service Commission was arbitrary or otherwise unlawful. In such case its decision is final.

Plaintiff's motion is overruled. Defendant's motion is granted, and plaintiff's petition will be dismissed.

It is so ordered.

LARAMORE, *Judge;* MADDEN, *Judge;* LITTLETON, *Judge;* and JONES, *Chief Judge,* concur.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1957 425898 1253